

**Gulf States Manufacturers, Inc. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, Local 692, Case 26-CA-8382**

May 13, 1982

**DECISION AND ORDER**

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

On January 30, 1981, Administrative Law Judge William N. Cates issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge, to the extent consistent herewith, and to adopt his recommended Order, as modified herein.

1. The circumstances surrounding the meeting at which employee Vincent Scott was disciplined are set forth in detail in the Administrative Law Judge's Decision and need not be fully repeated herein. On or about February 11, 1980, Scott experienced back pain, ostensibly as a result of lifting pallets at Respondent's facility. Scott testified that Respondent's physician gave him medication which made him dizzy and unable to perform certain work assigned to him. On February 13, Scott received a written warning from Respondent for failing to perform assigned work. Thereafter, Scott left the plant without performing additional assigned work and Respondent's Production Manager Schwichtenberg discussed Scott's conduct with Supervisor Nettie Grayer. Schwichtenberg instructed Grayer to write up a warning for Scott, which she did. On the following morning, Supervisor Wayne Eaves informed Scott that he was wanted in Schwichtenberg's office. Scott told Eaves that he wanted Ed Thompson, the union president, to accompany him to the office. Eaves told Scott he could not have Thompson with him

"because the company was not bargaining with the Union."<sup>2</sup>

Upon entering the office, Scott was informed that his failure to remain at the plant and perform assigned work had cost Respondent money, since his absence caused three employees to be idle. Schwichtenberg told Scott that he was, therefore, being given a written reprimand. Scott responded that he knew why Schwichtenberg was doing this and that it was because of recent events at the plant. Scott was apparently referring to the decertification election on February 7, which was won by the Union.<sup>3</sup> Schwichtenberg replied that this was not the reason. Scott further told Schwichtenberg that he did not remain at the plant because he had left his medication at home and that he had so informed three fellow employees. Schwichtenberg then asked Scott why he had not gone to Hugh Thaxton, his immediate foreman. Scott replied that he had already "had some words" with Thaxton earlier that day and that he did not see Eaves or Supervisor Grayer at the time so he just told the three employees.

The Administrative Law Judge found that Respondent did not violate Section 8(a)(1) of the Act by denying Scott a representative when it met with him, since the meeting was solely for the purpose of informing him of and acting upon its previously made decision to discipline him. We do not agree. Regardless of Respondent's original purpose for the meeting, its conduct in discussing Scott's actions with him and questioning him concerning his reasons for failing to inform Foreman Thaxton of his departure went "beyond merely informing the employee of a previously made disciplinary decision" and thus the protections accorded under *Weingarten*<sup>4</sup> were applicable.<sup>5</sup> Respondent's conduct constituted more than merely a conversation concerning its reasons for the previously determined discipline. Rather, Respondent delved further into the circumstances surrounding Scott's justification for his conduct and, in effect, sought further facts in support of its action against Scott. Thus, Respondent's conduct removed this meeting from the narrow holding of *Baton Rouge Water Works Company*,<sup>6</sup> and, accordingly, a right to union representation attached.<sup>7</sup>

<sup>2</sup> The Administrative Law Judge correctly found that Scott reasonably believed that disciplinary action might result from this meeting and that Scott had requested and been denied a union representative.

<sup>3</sup> There is no allegation that Scott was disciplined because of any union activity.

<sup>4</sup> *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

<sup>5</sup> *Baton Rouge Water Works Company*, 246 NLRB 995 (1979).

<sup>6</sup> *Id.*

<sup>7</sup> Although Member Fanning agrees with his colleagues that Respondent's conduct violated Sec. 8(a)(1), he does so for the reasons set forth in

*Continued*

<sup>1</sup> The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

With respect to a remedy for the 8(a)(1) violation, however, we find nothing in the record to warrant the conclusion that Respondent's decision to discipline Scott with a written warning was based on any information it obtained in the unlawful interview. The only information obtained by Respondent from its interview with Scott was Scott's explanation as to the reasons why he did not notify any of Respondent's supervisors that he was leaving the plant. The record reveals that Respondent had already decided to discipline Scott for failing to perform assigned work and for leaving the plant and there is no indication that Respondent decided to discipline him because it considered his explanation to be unsatisfactory.<sup>8</sup> Rather, the evidence shows that, in disciplining Scott, Respondent "relied solely on information obtained prior to the unlawful interview rather than anything obtained therein."<sup>9</sup> Accordingly, we will not order a "make-whole" remedy,<sup>10</sup> but shall provide our traditional cease-and-desist order to remedy Respondent's 8(a)(1) violation.<sup>11</sup>

2. The Administrative Law Judge further found, and we agree, that Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union over its decision to lay off a number of employees on March 10 and April 8, 1980. However, he failed to recommend as part of the remedy any backpay for those employees affected by the layoffs. We find merit in the General Counsel's contention that the Administrative Law Judge erred in failing to recommend a backpay remedy. In our view, Respondent's failure to bargain prior to the layoffs can be fully remedied only by restoration of the *status quo ante*. Although the layoffs may have been economically motivated, had Respondent met its statutory responsibility to notify the Union of the action contemplated and to bargain over the decision, the employees laid off clearly would have been employed until completion of the bargaining.<sup>12</sup> Accordingly, we shall order a

backpay remedy for any loss of earnings from the date of the layoffs until the date the obligation to bargain is met, in the manner more fully set forth below.

#### AMENDED REMEDY

Having found that Respondent violated Section 8(a)(1) of the Act by denying employee Vincent Scott's request for a union representative at an interview which he reasonably believed might result in disciplinary action, we shall order that Respondent cease and desist from engaging in such unlawful conduct.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by laying off employees without notice to or bargaining with the Union, we shall order Respondent upon request to bargain with the Union concerning the layoffs of employees on March 10 and April 8, 1980. We shall further order that Respondent make whole those employees laid off on those dates by paying them their normal wages from the date of their layoff until the earliest of the following conditions are met: (1) Mutual agreement is reached with the Union relating to the subjects about which Respondent is required to bargain; (2) good-faith bargaining results in a bona fide impasse; (3) the failure of the Union to commence negotiations within 5 days of the receipt of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith.<sup>13</sup> Backpay shall be based on the earnings which these employees normally would have received during the applicable period, less any net interim earnings, and shall be computed in the manner set forth in *F. W. Woolworth Company*,<sup>14</sup> with interest thereon computed in the manner set forth in *Florida Steel Corporation*.<sup>15</sup>

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Gulf States Manufacturers, Inc., Starkville, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

his dissenting opinion in *Baton Rouge Water Works Company*, *supra*. In Member Fanning's opinion, a *Weingarten* right attached when Respondent engaged in a discussion with Scott concerning his conduct and questioning him, thus converting what may have originally been intended as an announcement of disciplinary action into an interview. Compare *Texaco, Inc.*, 251 NLRB 633 (1980) (then-Chairman Fanning and Member Penello concurring).

<sup>8</sup> Compare *Ohio Masonic Home*, 251 NLRB 606 (1980).

<sup>9</sup> *Coyne Cylinder Company*, 251 NLRB 1503 (1980).

<sup>10</sup> Since the employee involved herein received only a disciplinary warning, our finding that a "make-whole" remedy is inappropriate precludes revocation of the disciplinary warning and expunction of all disciplinary records.

<sup>11</sup> *Kraft Foods, Inc.*, 251 NLRB 598 (1980). Member Jenkins would order a "make-whole" remedy in this case for the reasons set forth in his dissenting opinion in *Kraft Foods, Inc.*

<sup>12</sup> *Amsterdam Printing and Litho Corp.*, 223 NLRB 370 (1976), *enfd.* 559 F.2d 188 (D.C. Cir. 1977).

<sup>13</sup> See, e.g., *National Family Opinion, Inc.*, 246 NLRB 521 (1979).

<sup>14</sup> 90 NLRB 289 (1950).

<sup>15</sup> 231 NLRB 615 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

1. Insert the following as paragraph 1(a) and re-letter the subsequent paragraphs accordingly:

"(a) Denying to any employee, upon request, the presence and assistance of his or her union representative at an interview which the employee reasonably believes may result in disciplinary action."

2. Insert the following as paragraph 2(b) and re-letter the subsequent paragraphs accordingly:

"(b) Make whole those employees laid off on March 10 and April 8, 1980, for any loss of pay suffered as a result of its unlawful conduct in the manner set forth in that portion of the Board's Decision entitled 'Amended Remedy.'"

3. Substitute the attached notice for that of the Administrative Law Judge.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT deny to any employee, upon request, the presence and assistance of his or her union representative at an interview which the employee reasonably believes may result in disciplinary action.

WE WILL NOT refuse to bargain in good faith with International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, Local 692, as the exclusive representative of the employees in the unit described below, concerning the rates of pay, hours of employment, and other terms and conditions of employment.

WE WILL NOT, without adequate timely notice to and consultation with the Union, lay off bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in

the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain in good faith with International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, Local 692, in the unit described below with respect to rates of pay, wages, hours of employment and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement:

All production and maintenance employees, plant clerical employees, full-time and regular part-time truck drivers and leadmen employed at the Employer's Starksville, Mississippi location, but excluding all office clerical employees, draftsmen, guards and supervisors as defined in the Act.

WE WILL make whole those employees laid off on March 10 and April 8, 1980, for any loss of pay suffered as a result of our unlawful conduct in the manner set forth in that part of the Board's Decision entitled "Amended Remedy."

GULF STATES MANUFACTURERS, INC.

#### DECISION

##### STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge: A hearing with respect to this matter was held at Starkville, Mississippi, on November 5 and 6, 1980. The charge herein was filed by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, Local 692, hereinafter called the Union or the Charging Party, on April 14, 1980. A complaint and notice of hearing issued on May 30, 1980; an amendment to the complaint and notice of hearing issued on October 1, 1980; and the complaint was further amended on November 5, 1980. The complaint and amendments thereto allege that Gulf States Manufacturers, Inc., hereinafter called Respondent or Employer, violated Section 8(a)(1) of the National Labor Relations Act, hereinafter called the Act, through various acts of interference, restraint, and coercion of its employees by its supervisors and agents, and that Respondent violated Section 8(a)(1) of the Act by denying its employee Vincent Scott the right to have a union representative present during an interview in which the employee could reasonably have expected disciplinary action, and that Respondent violated Section 8(a)(5), (3), and (1) of the Act by discontinuing without notice to the Union a past practice of granting wage increases to its employees without having afforded the Union an opportunity to negotiate and bargain with respect thereto, and finally that Respondent violated Section 8(a)(5) and (1) of the Act when it laid off certain employees on March 10 and April 8, 1980, without

notice to or bargaining with the Union with respect to the layoffs and/or the effects thereof. Respondent filed timely answers to the complaint and amendments thereto in which it denied having violated the Act.

All parties appeared at the hearing and were afforded full opportunity to present oral and written evidence and to examine and cross-examine witnesses. Upon the entire record,<sup>1</sup> together with careful observation of the demeanor of the witnesses, and consideration of briefs filed by counsel for the General Counsel and counsel for Respondent, I make the following:

## FINDINGS OF FACT

### I. JURISDICTION

Respondent is a corporation licensed to do business in the State of Mississippi with an office, plant, and place of business located in Starkville, Mississippi, where it is engaged in the manufacture of metal buildings. During the 12-month period preceding issuance of the complaint and notice of hearing herein Respondent sold and shipped finished products valued in excess of \$50,000 directly to customers located outside the State of Mississippi. The complaint alleges, Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Background

On September 12, 1975, a majority of Respondent's production and maintenance employees<sup>2</sup> designated and selected the Union as their bargaining representative in a secret-ballot election conducted by Region 26 of the National Labor Relations Board, hereinafter the Board. On November 11, 1975, the Union was certified by the Board as the exclusive bargaining representative of the employees in an appropriate bargaining unit.<sup>3</sup> On No-

<sup>1</sup> Counsel for the General Counsel's unopposed motion to correct the official transcript is hereby granted.

<sup>2</sup> A full description of the bargaining unit is:

All production and maintenance employees, plant clerical employees, full-time and regular part-time truck drivers, and leadmen employed at Respondent's Starkville, Mississippi plant. Excluded: All office clerical employees, draftsmen, guards, and supervisors as defined in the Act.

<sup>3</sup> Respondent at the hearing requested and I have taken judicial notice of the Fifth Circuit Court of Appeals' Decision in *Gulf States Manufacturers, Inc. v. N.L.R.B.*, 579 F.2d 1298 (5th Cir. 1978), *aff'd* in pertinent part *en banc* 101 LRRM 2805 (1979), wherein certain facts of that case, by way of background with respect to the case at bar, were as follows: Negotiations following the Certification of Representative on November 11, 1975, did not result in a contract, but rather culminated in a bargaining impasse. The Union on February 14, 1976, commenced a 6-day strike that the circuit court of appeals determined was economic in nature. The circuit court also determined there was a lack of substantial evidence to support the Board's findings in *Gulf States Manufacturers, Inc.*, 230 NLRB 558 (1977), that Respondent had failed to bargain in good faith in violation of Sec. 8(a)(5) and (1) of the Act. Specifically, the circuit court

concluded that the record evidence did not support the Board's conclusions and findings (1) that the strike was an unfair labor practice strike; (2) that the wage increase by the Company violated Sec. 8(a)(5) of the Act; (3) that the failure of the Company to discharge replacement employees and reinstate strikers was a violation of Sec. 8(a)(3) and (1) of the Act; and (4) that the strikers were entitled to be reinstated to their former positions without prejudice to their rates of pay, compensation, or other losses.

#### B. The Alleged Violations of Section 8(a)(1) of the Act

The General Counsel in his complaint alleges Respondent violated Section 8(a)(1) of the Act in various respects during the period extending from on or about January 24, 1980, to on or about May 15, 1980. Unlawful conduct is attributed to Plant Manager Jim Nixon and Supervisors Wayne Eaves and Jerry Ellington. Respondent by its answer admitted the supervisory status of each of the above-listed individuals and accordingly I find that each of the named individuals was a supervisor within the meaning of the Act at all times material to the complaint herein.<sup>4</sup> The specific complaint allegations are summarized and discussed below.

#### 1. The alleged denial of a union representative to an employee

Paragraph 7 of the complaint alleges that on or about February 14, 1980, Respondent denied its employee Vincent Scott the right to have a union representative present during an interview in which Scott could reasonably have expected disciplinary action to result. Paragraph 7 of the complaint further alleges that Respondent told employee Scott that he could not have a union representative present during an investigatory interview because Respondent was not bargaining with the Union.

Counsel for the General Counsel relies upon the testimony of employee Scott to establish the violation.

Scott had been a sheet metal department employee of Respondent under the supervision of Supervisor Eaves from September 1976 until he was laid off at Respondent on June 16, 1980. There is no allegation of any unlawful conduct with respect to Scott's layoff. Scott served as vice president of the Union from July 1978 until his layoff in June 1980.

Scott testified that Respondent had a progressive system of discipline in which an employee who had re-

concluded that the record evidence did not support the Board's conclusions and findings (1) that the strike was an unfair labor practice strike; (2) that the wage increase by the Company violated Sec. 8(a)(5) of the Act; (3) that the failure of the Company to discharge replacement employees and reinstate strikers was a violation of Sec. 8(a)(3) and (1) of the Act; and (4) that the strikers were entitled to be reinstated to their former positions without prejudice to their rates of pay, compensation, or other losses.

<sup>4</sup> The parties stipulated at the hearing that Nettie Grayer was a supervisor within the meaning of the Act. There was no issue with respect to the supervisory status of Production Manager Jerry Schwichtenberg, Small Parts Supervisor Jerry Ellington, and Director of Employee Relations Tom Zeppelin, accordingly, I conclude and find that at all times material herein they were supervisors of Respondent within the meaning of the Act.

ceived two written warnings was terminated upon receipt of a third written warning. Scott was given two written warnings by Respondent over a 2-day period of time on or about February 13 and 14, 1980. Although the validity or the sufficiency of the grounds upon which the written warning notices were founded is not before me, it is necessary to state the surrounding facts briefly in order to understand the context in which the alleged denial of a representative to Scott arises.

On or about February 11, 1980,<sup>5</sup> Scott developed back pains allegedly as a result of lifting pallets from a table at Respondent. Scott testified that he was told by his immediate foreman, Hugh Thaxton, to consult with Director of Employee Relations Zeppelin about his injury. Scott was first directed to see a chiropractor and later directed to see Respondent's doctor. According to Scott, he was given medication which made him dizzy. Scott was assigned a job which he did not feel he should do because of his being dizzy. As a result of Scott's not doing the assigned job, he was given a written warning. Subsequent to the first written warning, Scott did not perform other assigned work.

The following day, February 14, 1980, Supervisor Eaves told Scott he was wanted in Production Manager Schwichtenberg's office. Scott testified that on the way to Schwichtenberg's office with Supervisor Eaves, "I asked Wayne Eaves, my supervisor—my foreman, that I wanted Ed Thompson with me in the office."<sup>6</sup> According to Scott, Supervisor Eaves told him, "... I could not have Ed Thompson with me because Ed Thompson was not recognized as a member of the bargaining committee because the Company was not bargaining with the Union." Scott at that time asked Supervisor Eaves if he was denying him his rights, and Eaves shook his head<sup>7</sup> as the two entered Schwichtenberg's office. According to Scott, those present in the office in addition to Schwichtenberg and himself were Irvin Pargon<sup>8</sup> and Supervisors Nettie Grayer and Wayne Eaves.

Upon entering the office, Schwichtenberg told Scott that he had instructed Supervisor Grayer to write Scott a disciplinary warning because he failed to work for Grayer the day before. Schwichtenberg told Scott that his failure to remain present at Respondent's plant and to perform assigned work had cost the Respondent money and that Scott's absence caused three employees to be idle; for these reasons he was being given a written reprimand.

Scott testified he responded to Schwichtenberg by stating he knew why Schwichtenberg was doing this, that it was because of recent events taking place in the plant. According to Scott, Schwichtenberg told him it was not. Scott told Schwichtenberg that Respondent

may as well fire him at that time because he would be fired anyway in that this was two written reprimands he had received and that the next one would terminate him.

Scott testified that he then told Schwichtenberg the reason he did not remain at Respondent's plant or perform the work assigned. Scott told Schwichtenberg he had informed three fellow employees, namely Roy Brown, Roosevelt Tate, and Lexie Tate, that he would not be able to work because he had left his medication at home. Scott also told Schwichtenberg that he was fed up with Respondent and Respondent's foremen, and that he was ready to go home at the time of the assigned work he did not perform. Scott testified Schwichtenberg asked him at this point, "How come I didn't go to Hugh Thaxton?"<sup>9</sup> Scott told Schwichtenberg that he did not go to Thaxton because he and Thaxton had already had some words earlier that day, and that he did not see Supervisor Eaves at the time. Scott testified that he told Schwichtenberg he (Scott) did not say anything to Supervisor Grayer, the supervisor for the work he was to have performed, because she did not pass through the department where he was. Scott told Schwichtenberg he simply informed his three fellow employees he was leaving his assigned work.

Schwichtenberg testified that on February 13, 1980, he discussed with Supervisor Grayer employee Scott's conduct and instructed Supervisor Grayer to write a warning notice for employee Scott. The actual warning notice was issued to Scott on February 14, 1980. The February 14 disciplinary warning was received in evidence as Respondent's Exhibit 1. Schwichtenberg testified the notice was prepared by Grayer and given to him on the morning of February 14, 1980, prior to his (Schwichtenberg's) meeting with employee Scott. Schwichtenberg stated that when Scott came into the room he asked Scott to sit down across from him with his desk being between them. According to Schwichtenberg, he offered the previously prepared employee warning notice to Scott and Scott refused to sign it. Schwichtenberg testified that at no time during the meeting with Scott did Scott ask for Ed Thompson to be present.

According to Schwichtenberg, after employee Scott refused to sign the warning he (Scott) then commenced to tell Schwichtenberg why he did not report for his assigned work the previous day. Schwichtenberg told Scott of the consequences of his action which resulted in the written warning and that Scott's action had caused a delay in production, had wasted man-hours and cost Respondent money. According to Schwichtenberg, after Scott refused to accept the warning and following Schwichtenberg's explanation to Scott about the warning, Scott told Schwichtenberg, "Well, I was so fed up yesterday. I told some people to tell Nettie or something like that or to that effect." Schwichtenberg stated Scott did most of the talking describing why he did not work. Schwichtenberg acknowledged that he told Scott at that time that he had two written warnings and that the actions that Scott had taken the last couple of days were just leading to a disciplinary problem, and that Scott was

<sup>5</sup> Scott was never able to be precise as to specific dates; however, I do not find the minor date discrepancies in Scott's testimony to detract from his credibility or to affect the issue of a denial of a representative to Scott.

<sup>6</sup> As will be set forth elsewhere in this Decision, Thompson was the president of Local 692 of the Union.

<sup>7</sup> The record does not reflect which way Eaves shook his head; however, it is not essential to know whether Eaves' indication was affirmative or negative.

<sup>8</sup> At the time of the Scott interview in Schwichtenberg's office, Irvin Pargon was a structural superintendent for Respondent.

<sup>9</sup> Hugh Thaxton was Scott's immediate foreman; Thaxton reported to Supervisor Eaves.

getting close to the point of becoming discharged with one more written warning. According to Schwichtenberg, Scott stated, "I guess that's it then," and got up and left. Schwichtenberg specifically denied that he asked employee Scott why he did not contact Foreman Thaxton or Supervisors Eaves or Grayer.

Scott appeared to be a credible witness worthy of belief. Moreover, it seems very probable from the uncontroverted and admitted portions of the conversation between Scott and Schwichtenberg at the interview that Schwichtenberg did in fact ask employee Scott why he did not contact his foreman, Thaxton, regarding his absence. Schwichtenberg had explained to Scott the gravity of the acts that Scott had committed, and Scott had volunteered his version of the events to Schwichtenberg. Accordingly, I specifically credit Scott's testimony that Schwichtenberg asked him why he had not contacted Thaxton, and I discredit Schwichtenberg's testimony to the contrary with respect to this specific incident.

I credit the testimony of Scott that he asked Supervisor Eaves to have Ed Thompson present with him at the meeting. Supervisor Eaves was not called by Respondent to testify. It is undisputed that at the time Scott asked for Ed Thompson to be present with him he had received a disciplinary warning the previous day. I therefore conclude and find that Scott in fact believed that disciplinary action would be taken against him at the interview on February 14, 1980. I further conclude and find that the request by Scott to have Thompson present with him was sufficient to invoke if otherwise required the right to representation as outlined in *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), in that Ed Thompson was known both to Respondent and its supervisors as the president of the Union. The request for Thompson was equivalent to a request for union representation. See *Southwestern Bell Telephone Company*, 227 NLRB 1223 (1977).

The meeting of Respondent with employee Scott on February 14, 1980, raises a question as to whether Respondent violated the Act by refusing to allow Scott to have a union representative at the meeting. An employee has a Section 7 right upon request to have a union representative present during an interview that the employee reasonably believes could result in disciplinary action. This Section 7 right was enunciated by the Supreme Court in *Weingarten*, *supra*. The United States Supreme Court in *Weingarten* addressed itself to whether an employer may deny a request for union representation in investigatory interviews. The Supreme Court did not specifically address itself to the situation where an employer denies an employee union representation during a disciplinary interview. The Board held in *Certified Grocers of California, Ltd.*, 227 NLRB 1211 (1977), that an employee had a right to union representation at a meeting where the employee was notified of disciplinary action taken against the employee and that the employer could not require an employee to attend the meeting while at the same time refusing the employee's request for union representation. The Ninth Circuit Court of Appeals denied enforcement in *Certified Grocers of California, Ltd.*, 587 F.2d 449 (1978).

The Board reviewed its decision in *Certified Grocers of California Ltd.*, in its decision in *Baton Rouge Water Works Company*, 246 NLRB 995 (1979), wherein it held that *Certified Grocers of California, Ltd.* had been wrongly decided on its facts and overruled their decision therein. In *Baton Rouge Water Works Company*, *supra* at 997, the Board held:

In *Certified Grocers* the Board concluded that the Supreme Court's decision in *Weingarten* applied to any interview, whether labeled investigatory or disciplinary, which the employee reasonably believes may result in disciplinary action being taken against him. The United States Court of Appeals for the Ninth Circuit denied enforcement of the Board's Order, as in its opinion *Weingarten* did not require a right to representation when the purpose of the interview was merely to inform the employee that he was being disciplined. We have reexamined our decision in *Certified Grocers* and now think that the case was wrongly decided on its facts. To that extent, it is hereby overruled. We now hold that, under the Supreme Court's decision in *Weingarten*, an employee has no Section 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of, informing the employee of and acting upon, a previously made disciplinary decision.

We stress that we are not holding today that there is no right to the presence of a union representative at any "disciplinary" interview. Indeed, if the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision, the full panoply of protections accorded the employee under *Weingarten* may be applicable. Thus, for example, were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrongdoing or to sign a statement to that effect, or to sign statements relating to such matters as workmen's compensation, such conduct would remove the meeting from the narrow holding of the instant case, and the employee's right to union representation would attach. In contrast, the fact that the employer and employee thereafter engaged in a conversation at the employee's behest or instigation concerning the reasons for the previously determined discipline will not, alone, convert the meeting to an interview at which the *Weingarten* protections apply.

In summary, as long as the employer has reached a final, binding decision to impose certain discipline on the employee prior to the interview, based on facts and evidence obtained prior to the interview, no Section 7 right to union representation exists under *Weingarten* when the employer meets with the employee simply to inform him of, or impose, that previously determined discipline. To the extent that the Board has in the past distinguished between investigatory and disciplinary interviews, in light of

*Weingarten* in our instant holding, we no longer believe such a distinction to be workable or desirable.

Applying the Board's reasoning in *Baton Rouge Water Works Company* to the facts in the instant case, it appears to me that the meeting of February 14 constituted nothing more than a meeting wherein Respondent informed employee Scott of its previously made disciplinary decision. It is undisputed that the decision to discipline employee Scott had been formulated and the nature of the discipline to be imposed upon Scott had been determined prior to the meeting with employee Scott at which the discipline was imposed. Further, it is clear that the decision to discipline Scott was not based on information which was obtained during the interview of Respondent with Scott. I conclude and find that the question Production Manager Schwichtenberg asked of employee Scott was innocuous and was made in response to a conversation instigated by employee Scott. Neither the conversation between Schwichtenberg and Scott nor the question asked by Schwichtenberg would constitute an attempt by Respondent to seek facts or evidence in support of its action or to have employee Scott admit any wrongdoing.

I therefore conclude and find that Respondent did not violate the Act by denying Scott a representative when it met with him solely for the purpose of informing him of and acting upon its previously made disciplinary decision. I therefore recommend that paragraph 7 of the complaint be dismissed in its entirety.

2. Alleged statements by Supervisor Ellington that wage increases depended upon voting out the Union

Paragraphs 8(a) and (b) of the complaint allege that on or about January 31, 1980, Respondent through Supervisor Ellington told employees that a wage adjustment was due, but that if the Union won the election the amount would have to be negotiated; and that on or about February 4, 1980, Respondent through Supervisor Ellington told employees there would be a wage increase if the Union were voted out, but if the Union came in the increase would have to be negotiated.

Counsel for the General Counsel relies upon the testimony of employees Willie Campbell and James Rondall Lewis to establish these violations.

With respect to the January 31, 1980, allegation, the only record evidence with respect thereto was the testimony of employee Lewis that Supervisor Ellington and he were present alone at Lewis' work area in the plant and Lewis stated: "I approached him [Ellington] and asked him about a rumor that was in the plant concerning a dollar raise. And Mr. Ellington immediately said that that wasn't the straight of it, that it was a conversation that he'd had with Mr. Nixon . . . . He said that Mr. Nixon, the general manager of the plant, told him that it was from the time that the Union was first voted in five years ago that the plant should have given raises over that five-year period that would have been equal to

a dollar in raises over the five-year period and that was about all he said."<sup>10</sup>

Supervisor Ellington denied telling employee Lewis that Plant Manager Nixon had told him (Ellington) that from the time the Union was voted in at Respondent in 1975 that the employees should have been getting a dollar an hour more. Ellington testified that in a conversation with Lewis he was asked a question by Lewis regarding the wages employees were making at the plant where Plant Manager Nixon had previously been employed. Ellington stated he told Lewis he believed that it was something similar to a dollar an hour. Both Ellington and Nixon testified that Nixon had worked at Pasco, a competitor of Respondent in the presale metal building industry, prior to his coming to work for Respondent and that the wages at Pasco were approximately a dollar an hour more than they were at Respondent. Nixon denied ever telling Supervisor Ellington or anyone else that if the Union had not been at Respondent since 1975 the employees' pay would have been a dollar an hour more. Nixon also testified that he was unaware of any such rumor to that effect at Respondent's plant.

After careful observation of their testimony, I have concluded that both Ellington and Nixon's testimony is worthy of belief. I therefore credit Ellington's version of his January 31, 1980, conversation with employee Lewis to the effect that he explained to employee Lewis at employee Lewis' request that the wage difference at Respondent's plant and Plant Manager Nixon's previous employer, Pasco, was approximately one dollar. I specifically discredit employee Lewis' testimony that Ellington had stated that, since the Union had been there, the employees should have received a one dollar pay raise.<sup>11</sup> I therefore recommend dismissal of paragraph 8(a) of the complaint.

With respect to paragraph 8(b) of the complaint, employee Lewis testified that he and fellow employee Campbell were discussing the Union when Jerry Ellington walked up to where they were and stated "that we should give the Company a chance, that the Company was planning to give a wage adjustment on the 14th, he said, provided the Union was voted out, but that if the Union remained in the plant that any adjustment would be subject to negotiations." According to Lewis, he then asked Ellington "if he meant that if the employees of the plant would vote the Union out that the Company would

<sup>10</sup> Counsel for the General Counsel contends that employee Willie Campbell testified in support of this paragraph portion of the complaint. Counsel for the General Counsel makes this contention in his brief where he sets forth the name of each witness he called; the complaint paragraph number that he contended the witness testified about; a one-word description of the type of violation alleged in the particular numbered complaint paragraph; and a citation to transcript page numbers, without elaboration. Notwithstanding counsel for the General Counsel's unexplained contention, it is obvious that employee Campbell was testifying with respect to the February 4, 1980, conversation with Supervisor Ellington in that Campbell stated Lewis and Ellington were both present in the conversation at which he was present, and about which he testified.

<sup>11</sup> Assuming, *arguendo*, that Lewis' version were correct, I still would not find a violation in that the conversation if credited is ambiguous as to its meaning and would not in any manner support an allegation as set forth in the complaint that employees were told that a wage adjustment was due, but if the Union won the election the amount would have to be negotiated.

give us a raise. He said no, not exactly. I said do you mean that if we vote it out you'll give us a cut. He said no, that he assured me that any adjustment would not be a cut. Then at that time another employee walked up and that was the end of the conversation."

Employee Willie Campbell testified he and Lewis were together when Ellington walked up and, according to Campbell, Lewis asked "if there would be a raise and Jerry Ellington, he said that there was going to be a raise adjustment. And James Lewis, he asked if the wages was going to be raised, and he [Ellington] said possibly . . . James Lewis, he asked if they would go down and he said possibly but not very likely. And Jerry Ellington said if the Union went back in there would have to be a negotiation on any increases on wages. Then we just got to small talk." According to Campbell, Ellington did not state when there would be a wage adjustment.

Supervisor Ellington testified that employees Campbell and Lewis approached him around either the first or middle part of February 1980, and inquired of him if Respondent was going to give a raise around February 13. Ellington stated he responded to them that he was not really sure, that it had been customary since he had been with Respondent to give one around that date.<sup>12</sup> Ellington stated that either Campbell or Lewis asked him if the Union was voted in would they get a raise or would they get a raise on that date. Ellington testified he told them, if the Union was voted in, it would be subject to negotiations. Ellington further testified that Campbell asked him "if a wage adjustment meant going up in wages or down or staying—" Ellington told Campbell that "bargaining could mean staying the same, going up or going down or whatever they settled on."

All three witnesses to the incident were in agreement that the subject matter of wage adjustments was discussed and that the subject matter was brought up by the two employees. Employee Campbell and Supervisor Ellington gave basically the same account of the conversation. However, employee Lewis testified that Ellington had stated that the wage adjustment would be granted "provided the Union was voted out . . ." As indicated *supra*, Supervisor Ellington impressed me as a credible witness, and as such I conclude and find that the conversation which took place between him and employees Campbell and Lewis was as Ellington testified. This conclusion is strengthened by the fact that Campbell's testimony essentially corroborated that of Supervisor Ellington. I specifically discredit employee Lewis' comment attributed to Ellington that the wage adjustment was conditioned upon voting out the Union.

I conclude and find that Ellington's comments taken in the context of the instant case do not violate the Act. I shall therefore recommend that paragraph 8(b) of the complaint be dismissed.

### 3. Alleged 8(a)(1) violations attributed to Plant Manager Nixon

Paragraph 9(a) of the complaint alleges that on or about January 24, 1980, the exact date being unknown,

Respondent acting through Plant Manager Nixon told employees that a wage increase was due on or about February 14, 1980, but if the Union won the election the amount would have to be negotiated.

Counsel for the General Counsel relies upon the testimony of employees David E. Wright, Larry Moore, and Willie C. Campbell to establish the violations alleged.

Larry Moore, a structural department employee from 1977 until his layoff in March 1980, testified that he attended three meetings of employees at which Plant Manager Nixon was present. Moore stated the meetings were in the latter part of January or the first part of February 1980. According to Moore, all of the night-shift employees were present at the meeting he attended. Moore recalled that Nixon said, "Yeah, he mostly talked about how slow business was, and I, you know, asked him about a pay raise. Well he said that we were due one but if the Union won then it makes them be negotiated between the Union and the plant on how much we would get." According to Moore, Nixon did not explain what he meant by one being due.

Small parts department employee Campbell testified that he attended meetings from January until February 7, 1980. Campbell recalled Nixon having stated, "Well, he said that if the Union went in that any wage increase would have to be negotiated. He asked us if we would take the Union out and that's about all I can remember." According to Campbell, Nixon further stated that the reason there would have to be negotiations on any increase was because of a complaint that was filed by the Union. Campbell testified that Plant Manager Nixon seemed to be reading his speech from a prepared text as he stood in front of a podium-type lectern.

A night-shift employee, David E. Wright, who had worked for Respondent approximately 6 months or less until he was laid off on March 10, 1980, testified he attended two meetings which were within a month of the February 7, 1980, decertification election, at which Plant Manager Nixon and Production Manager Schwichtenberg were present. Wright testified that he did not recall anything about the first meeting with Nixon. According to Wright, a film was shown at the first meeting and that Nixon made no comment about the film.<sup>13</sup> Wright stated that the second meeting where he was present was in Nixon's office. In the second meeting Nixon discussed how the plant was running without a union; that he thought it was a nice place to work; and that he could see no reason for a union. Wright testified that employee Larry Moore raised a question about a raise and Nixon replied "that we would get a raise—I believe it was a cost of living raise—around the first part of the year, January or February; but if the Union was voted in that say whatever raise that the employees in the Company had decided on that if the Union didn't agree with it that particular raise or whatever if the Union was voted in that it would be negotiated then the raise would be postponed."

<sup>13</sup> There are no allegations in the complaint with respect to any matters that may have been in the film which was shown to employees of Respondent.

<sup>12</sup> Ellington testified that he arrived at Respondent in February 1978.

Upon cross-examination Wright acknowledged that the word "postponed" was not used, that it was his impression that Nixon meant to imply that the raise would be postponed.

Plant Manager Nixon testified he conducted three meetings with Respondent's employees. At one of the meetings a film was shown. Nixon testified, and I credit his testimony, that no questions were taken from those in attendance either before or after the meeting in which the film was shown. Employee Wright corroborates the testimony of Nixon in this respect. Nixon testified that he read two speeches the text of which are in evidence as Respondent's Exhibits 7 and 8. The first speech was read to employees on January 21, 1980, and the second speech was read to employees during the week immediately preceding the February 7, 1980, decertification election. Nixon testified that he delivered the speeches from a lectern or podium at the front of the cafeteria or breakroom where the employees were assembled. Nixon stated that as he delivered the speeches he had Director of Employee Relations Zeppelin follow along on a copy of each speech. Both Nixon and Zeppelin testified that Nixon did not deviate from the written text of the speeches. Nixon and Zeppelin both testified that no questions were asked by the assembled employees either before or after the speeches. I credit the testimony of Nixon, Schwichtenberg, and Zeppelin that Nixon read his speeches,<sup>14</sup> did not deviate from the written text of the speeches, and that no questions were taken or answers given either before, during, or after the meetings with employees as described above. I therefore recommend that paragraph 9(a) of the complaint be dismissed in its entirety.

Paragraph 9(b) of the complaint alleges that at various times between February 7 and May 15, 1980, Respondent acting through Plant Manager Nixon told employees that Respondent could not grant scheduled pay raises because its hands were tied because of the Union.

<sup>14</sup> I do so based on my observation of their testimony and the other factors discussed hereinafter in this footnote. Employee Campbell testified that Nixon appeared to be reading that speech that he gave. I conclude that employee Wright was somewhat confused with respect to his testimony in that he placed the location of Nixon's speech as being in Nixon's office whereas the evidence rather overwhelmingly demonstrated that the speeches were given in the plant cafeteria. I conclude that Wright was attempting to testify with respect to the same speech Moore had in that both insisted that Moore asked a question. I specifically discredit the testimony of Wright and Moore that Moore asked Nixon a question with respect to raises. A careful review of the speeches given by Nixon indicates they do not contain the statements attributed to Nixon by employees Wright, Campbell, and Moore. Additionally, there is some ambiguity as to when the meetings took place that Wright and Moore testified about in addition to the conflict as to what was said in the meetings. Nixon testified that, in late November or early December 1979, a time prior to and outside the context of the campaign in the decertification election which was held on February 7, 1980, he held a series of meetings with groups of employees on various shifts. In these meetings he discussed how the business at Respondent had been deteriorating causing a number of layoffs, shutdowns, and a shortening of the work week. Nixon testified that in those meetings held in November or December 1979 he recalled responding to a question asked by Moore when employee Wright was present as to when the employees were going to get a pay raise. Nixon stated he responded to Moore's question at that time that he did not know and had no way of knowing. I credit this testimony of Nixon and conclude that it further demonstrates that employees Wright and Moore were confused as to what was said and when it was said by Nixon.

Counsel for the General Counsel presented employees Willie Edmonds and Robert Daniels in support of this portion of the complaint. Edmonds testified that, approximately 3 weeks after the February 7, 1980, decertification election was conducted at Respondent's plant, he along with three or four other employees were present with Plant Manager Nixon when he asked Nixon for a raise. According to Edmonds, Nixon responded that he could not; his hands were tied. Edmonds stated nothing else was said nor any other comments made. Edmonds could not recall who the other three or four employees were that were present with him. Edmonds specifically stated that Nixon did not say his hands were tied because of the Union.

Edmonds' recollection of the events he testified about did not impress me as being very accurate; he could not, for example, recall anyone else who was present other than he and Nixon. However, even crediting Edmonds' testimony, I find it is too ambiguous to support a finding of any violation of the Act.

Employee Robert Daniels testified he discussed welders' wages with Plant Manager Nixon on at least one, or possibly more, occasion. He stated that the occasion he could recall happened approximately 5 or 6 weeks before the February 7, 1980, decertification election. Daniels testified that he and Edmonds talked to Nixon about the welders getting into a higher labor scale. Daniels testified: "Well, like I said, we asked Nixon about getting—seeing about getting—us in a higher labor scale, you know. He said he would as soon as he could. He said he would look into it. Well, I—well, of course, there was more said but that's all I can recall, I mean mainly." Daniels stated he did not discuss the welder situation any further with Nixon nor were there any more meetings after this one. Counsel for the General Counsel attempted to have employee Daniels refresh his recollection from a pretrial affidavit given to Region 26 of the Board. Employee Daniels, after having reviewed his affidavit, again testified essentially the same as set forth above. Counsel for the General Counsel then stated that he did not vouch for the credibility of any witness he called and requested that he be permitted to impeach his own witness within the meaning of Federal Rule of Evidence 607.<sup>15</sup> Counsel for the General Counsel then questioned employee Daniels further and directed him to his pretrial affidavit where it stated: "Nixon said that his hands were tied and that after the election maybe he could look into it." Counsel for the General Counsel asked Daniels if he had said that in his pretrial affidavit and Daniels replied: "As well as I remember, that's what he said."<sup>16</sup>

The testimony given on direct examination by Daniels does not appear to contain any comments that would attribute unlawful conduct to Plant Manager Nixon or any supervisor or management official of Respondent. Daniels did acknowledge certain comments were contained

<sup>15</sup> Fed. R. Evid. 607 states: "The credibility of a witness may be attacked by any party, including the party calling him."

<sup>16</sup> Counsel for the General Counsel did not attempt to have read into the record Daniels' prior statement as recorded recollection within the meaning of Fed. R. Evid. 803(5), but rather sought permission only to impeach his own witness' testimony within the meaning of Fed. R. Evid. 607.

in his affidavit regarding his conversation with Nixon; however, it would appear that he was reluctant to reaffirm such comments. I conclude that Daniels' testimony is unworthy of trust in that at the hearing he appears to have given more than one sworn version to the same set of facts, and as such I am not inclined to credit any testimony of him that is not otherwise corroborated. I conclude and find there is no clear and credible evidence to support a finding of any violation of the Act by Respondent as alleged in paragraph 9(b) of the complaint, and as such I shall recommend that portion of the complaint be dismissed in its entirety.

Paragraph 9(c) of the complaint alleges that on or about January 24, 1980, Respondent through Plant Manager Nixon told employees that wages would be raised if the Union were voted out.

Counsel for the General Counsel relies on the testimony of Malone Gillespi in support of this allegation of the complaint.

Employee Gillespi testified he had worked as a grain bin painter for Respondent from 1976 until the summer of 1980. Gillespi testified he attended a meeting with Plant Manager Nixon and approximately 75 other employees at some date between January and April 8, 1980. Gillespi could not be any more specific as to the date of the meeting. Gillespi stated that Nixon said "if we voted the Union out we would get a raise . . . if we didn't vote it out we wouldn't get a raise." Gillespi did not recall if Nixon was reading from a prepared text; however, he did recall that Nixon was standing behind a lectern when he gave the speech. Upon cross-examination Gillespi testified he could not recall if the speech could have been in 1978 or 1979. I find that employee Gillespi's memory was so vague that it is too unreliable to credit. Further, I note that Gillespi, who indicated there were 75 persons present to hear Nixon speak, was the only one called by the General Counsel to establish this violation. Additionally, as set forth elsewhere in this Decision, I credit the corroborated testimony of Nixon that he read his speeches from a prepared written text. An examination of Nixon's speeches indicates no such comments by Nixon. I therefore recommend that paragraph 9(c) of the complaint be dismissed in its entirety.

The complaint alleges at paragraph 9(d) that on or about February 21, 1980, Respondent through Plant Manager Nixon told employees that Respondent would consider wage increases after it saw how the election turned out.

Counsel for the General Counsel presented employee Felix Mobley in support of this allegation of the complaint.

Mobley testified he had worked for Respondent for approximately 9 months from mid-1979 until March 1980. According to Mobley, he attended two meetings at which Plant Manager Nixon spoke. Mobley placed the first meeting with Nixon in February 1980. Mobley recalled that Nixon spoke in his first speech about the conditions of the plant and business in general. Mobley testified that Nixon talked about the Union and pay raises at the second meeting in March 1980. According to Mobley, Nixon said "well, he was asked about a raise and he said the raise was past due [pause] that's about all

of it. He said it was past due but we'd get a raise after the election—and—uh—that's all I remember." Mobley placed the date of the second speech as having been after the Board-conducted decertification election. Counsel for the Respondent on cross-examination asked Mobley the following questions:

Q: (By Mr. Smith) O.K., did he say that the Company won the election by five votes?

A: That's what I understood.

Q: Did he say that?

A: That's what I understood.

Even if credited, there is nothing in Mobley's testimony with respect to the first meeting with Nixon that would constitute a violation of the Act. I find Mobley's testimony with respect to the second meeting he claimed to have attended wherein he heard Nixon say a raise was past due but that a raise would be forthcoming after the election to be inconsistent with his testimony that the second speech took place after the Board-conducted election had already been held. I find it incredible that Nixon would have announced to Respondent's employees that the victor in the election was Respondent when in fact the Union had won the election which had been conducted by the Board. Nixon denied, and his testimony was corroborated by Schwichtenberg, that he made the statements attributed to him by Mobley. Further, Nixon denied that he told Mobley or any other employee that Respondent had won the election by five votes. I therefore specifically discredit the testimony of employee Mobley that he was told by Nixon that a pay raise was past due but they would get one after the election. I shall therefore recommend that the allegations of paragraph 9(d) of the complaint be dismissed in their entirety.

*C. The Alleged Discontinuance by Respondent of Its Past Practice of Granting a Wage Increase On or About February 13, 1980*

Paragraphs 13(a) and 14 of the complaint allege that on or about February 13, 1980, Respondent discontinued its past practice of granting a wage increase on or about that date each year, and that Respondent did such acts without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of Respondent's employees with respect to such acts and conduct and effects of such acts and conduct.

Counsel for the General Counsel contends that Respondent has since 1976 had an established policy of granting employees general wage increases on or about February 13. Counsel for the General Counsel further contends that in 1980 Respondent withheld such an increase without notice to or consultation with the Union, and further contends that it was withheld ostensibly because of the pendency of the decertification petition.

Certain of General Counsel's witnesses testified to having received general pay increases in February since 1976; however, either they were unable to recall any such general increases in February prior to 1976 or they were not employed prior to that date.

Director of Employee Relations Zeppelin testified that he had determined from an examination of the records maintained by Respondent that in years 1971, 1972, 1973, and 1974 general wage increases were granted to Respondent's employees in months other than the month of February. Zeppelin further testified that in 1975 no wage increases were granted because all wages were frozen as a result of the economic status of Respondent. The 1975 wage freeze was discussed in *Gulf States Manufacturers, Inc. v. N.L.R.B.*, *supra*.

The evidence is conclusive that Respondent and the Union, following the original certification of the Union and after a substantial number of bargaining sessions, failed to arrive at a contract. As a result of those negotiations, Respondent made a final wage offer to the Union on February 6, 1976. The Union conducted an economic strike at Respondent's location from February 14 to February 20, 1976. After an impasse in negotiations Respondent implemented in February 1976 its last wage offer. The wage offer called for an increase in February 1976 and additional annual wage increases for 1977 and 1978. The Fifth Circuit Court of Appeals determined there had been good-faith bargaining on the part of Respondent and the impasse arrived at was a valid impasse brought about as a result of hard but good-faith bargaining. Therefore, the month of February was established as the month for wage increases of a general wage nature in 1976, 1977, and 1978. Local Union President Thompson testified that prior to the February 1979 raise he understood that International Union Representative Orman was contacted by Respondent and presented the proposed pay increase for 1979 and that the increase was negotiated between Orman and Respondent. Thompson stated that he did not participate in those negotiation discussions.<sup>17</sup>

I therefore conclude and find that Respondent by implementing its last wage offer following good-faith bargaining and a valid impasse<sup>18</sup> which resulted in general wage increases in 1976, 1977, and 1978, and negotiating with the Union with respect to the 1979 wage increase, did not establish a past practice of granting general wage increases in February of each year from which if it deviated it had to do so after bargaining with the Union regarding the discontinuance. Simply stated, I find there was no past practice of granting a wage increase by Respondent such as in the facts of this case would justify a finding of an unlawful unilateral discontinuance on the part of Respondent by not granting such a wage increase. Further, the evidence would tend to indicate, as reflected in Respondent's Exhibit 12, that the economic conditions of 1980 were very similar to those of 1975. Therefore, if there were any past practice at all on the part of Respondent it would appear to be that it did not grant wage increases when economic conditions were as indicated in 1975 and 1980. I therefore recommend dis-

missal of that portion of the complaint related to the allegation of a discontinuance on or about February 13, 1980, of a past practice of granting a wage increase at that time.<sup>19</sup>

The complaint alleges in paragraphs 13(b) and 14 that on or about March 10 and April 8, 1980, Respondent laid off certain specifically named employees, without prior notice to the Union and without having afforded the Union an opportunity to negotiate about such acts and conduct and the effects of such acts and conduct.

It is undisputed that layoffs occurred at Respondent on March 10 and April 8, 1980. It is further undisputed that there were 21 individuals laid off on each occasion.<sup>20</sup>

Respondent Employee/Local Union President Edgar L. Thompson credibly testified with respect to the two layoffs. Thompson stated he was notified by Director of Employee Relations Zeppelin approximately 10 to 15 minutes before employees were actually laid off on March 10, 1980, that they were going to be laid off. Upon being informed of the layoffs, Thompson asked Zeppelin if they were by seniority, and Zeppelin informed him they were. Zeppelin did not have a list of the names of those to be laid off at the time, but asked Thompson to check back with him later and he would provide him with a list. Thompson inquired of Zeppelin if those being laid off would be reclassified and rehired. Zeppelin told Thompson they would be, and at the same time told Thompson the approximate number of individuals involved in the layoff.

Thompson testified that a couple of weeks after the March 10, 1980, layoff he met with Zeppelin and discussed specific individuals affected by the layoff. Thompson stated that he discussed with Zeppelin why certain individuals with less seniority were retained while others with more seniority were included in the layoff. Zeppelin explained to Thompson that certain classifications were needed while others were not. Thompson and Zeppelin discussed Joyce Gamby, a more senior helper who was included in the layoff, while an individual with less seniority who was a machine operator was retained. According to Thompson, Zeppelin told him that machine operators were more critically needed than helpers. Thompson stated he then inquired of Zeppelin why Fred Wooten was laid off while others with less seniority were retained in the welding department. Thompson stated that Zeppelin informed him Wooten was a

<sup>17</sup> Counsel for the General Counsel's offer of proof in the form of questions and answers of witness Orman relating to the 1979 negotiations between Orman and Respondent's counsel would not provide any evidence that the raise in 1979 was other than negotiated even if the offer of proof were accepted. I am not accepting the General Counsel's offer of proof, but am rather continuing to reject it as improper rebuttal.

<sup>18</sup> Respondent was found to have bargained in good faith to a valid impasse. *Gulf State Manufacturers, Inc. v. N.L.R.B.*, *supra*.

<sup>19</sup> Counsel for the General Counsel contended in brief that Respondent withheld a wage increase that would have been granted but for the pendency of an election and as such violated the Act, citing *The Gates Rubber Company*, 182 NLRB 95 (1970). Counsel for the General Counsel relies upon evidence developed at the hearing on cross-examination of Zeppelin wherein he acknowledged that his pretrial affidavit given to the Board contained the following statement: "Employees did not receive an across-the-board raise because there was questions regarding representation and because we had an election coming up on February 7, 1980. No one at the Company discussed a raise." The *Gates*, *supra*, case is distinguishable in that there is no showing in the instant case of a past practice of granting a February across-the-board wage increase and in light of the no past practice there is no showing that the employees would have gotten or were informed they would have gotten an across-the-board wage increase but for the pendency of an election.

<sup>20</sup> G.C. Exh. 8(a) is a list of those employees laid off on March 10, 1980; and G.C. Exh. 8(b) is a list of those employees laid off on April 8, 1980.

tacker and that Respondent was cutting back on tackers and retaining those who were classified as welders.<sup>21</sup> Thompson also inquired why Hazel Ashford, a stockroom clerk employee, was laid off in the warehouse while Roger Paragon, a warehouseman hired after Ashford, was retained. According to Thompson, Zeppelin explained that Respondent was cutting back employees in Ashford's clerk classification while that of warehousemen such as Paragon's classification were being retained.

Thompson testified he learned of the April 8, 1980, layoff by observing employees being walked to the gate at Respondent's plant to turn in their hardhats and I.D. badges approximately 15 to 20 minutes before the end of their work shift. Thompson testified that at approximately the same time he was observing the employees leaving he received a telephone call from Zeppelin's office telling him that Zeppelin wanted to notify him about the layoff. Thompson stated he informed Zeppelin that he already knew about the layoff because he had observed the employees being walked to the gate at Respondent's plant. Thompson testified that Zeppelin apologized for not informing him earlier, that he had meant to, but had gotten tied up with something else.

Thompson stated he again asked Zeppelin if the layoff was by seniority and was told it was. Thompson stated he was further informed by Zeppelin that the employees would be rehired or recalled if business conditions improved. According to Thompson, both layoffs were by job classification. Thompson also discussed with Zeppelin certain select individuals who were among those laid off. Specifically, Thompson inquired about Jessie Harvel being laid off. Zeppelin informed Thompson that Harvel was a tackler and Respondent needed less senior welders rather than more senior helpers.

Respondent contends that it was merely following past practice with respect to the March and April 1980 layoffs. Comptroller Wilfred White and Director of Employee Relations Zeppelin both testified, and I credit their unrefuted testimony, that Respondent was unable to forecast the need for a layoff very far in advance. Several factors over which Respondent had no control contributed to Respondent being unable to forecast in advance of a layoff that one would be needed. Some of those factors were that a customer would place an order on "hold," that is, keep the order but not process it until further notice; the weather, i.e., too cold, wet or the like to pour footing upon which to place the metal building, or the weather being too adverse to make delivery to the construction site of the building; financing and/or building or construction permits. Based on these and other factors, Zeppelin testified that Respondent only knew 2 days ahead of both the March and April 1980 layoffs as to who and how many would be laid off.

With respect to past practice regarding layoffs, Thompson testified that he had notification by way of observing on March 22, 1979, a notice on the bulletin board at Respondent's plant that there would be a layoff

the next day, March 23, 1979.<sup>22</sup> Thompson testified, and as indicated elsewhere in this Decision I credit his testimony, that he was asked by Ronnie Sorter of Respondent's personnel department on March 23, 1979, if he (Thompson) was aware of the layoff that was to take place that day. Thompson told Sorter he had seen the notice on the bulletin board and asked him how many employees would be involved. Thompson was informed by Sorter that approximately 50 employees were involved. Thompson was notified by Zeppelin just prior to the actual start of the layoff that it was going to take place on that date. Thompson asked Zeppelin if the employees would be laid off according to seniority and was told they were and the employees would be subject to recall. Zeppelin told Thompson that a letter would be mailed out to the employees affected explaining to them their rights with respect to insurance and other matters.

According to Thompson, the March 1979 layoff was based on departmental seniority whereas the 1980 layoffs were by classification seniority. Thompson testified that he did not ask to negotiate about the 1979 layoff nor to his knowledge did International Union Representative Orman make such a request.<sup>23</sup> Thompson did discuss with Zeppelin the status of certain employees who were laid off in the 1979 layoff. Thompson stated he was told by Zeppelin that the layoff was by seniority, and Thompson acknowledged that the Respondent did in fact follow seniority. Thompson testified he did not protest to or desire that Respondent do the 1979 layoff different in any way from the way it was done.

Thompson acknowledged that business at Respondent was slack prior to the 1979 layoff as well as the 1980 layoffs.

The Union in the instant case won the Board-conducted decertification election on February 7, 1980. Following objections filed by the petitioner, the Board issued its Decision and Certification of Representative on August 4, 1980. An employer's obligation to bargain with a union arises on the date a majority of the appropriate bargaining unit employees selects the union as their representative. *Howard Plating Industries, Inc.*, 230 NLRB 178, 179 (1977). An employer may not unilaterally alter terms and conditions of employment of unit employees during the time that objections to an election are pending. *Master Slack and/or Master Trousers Corp.*, 230 NLRB 1054 (1977). The Board held in *Mike O'Connor Chevrolet-Buick-GMC Co., Inc.*, 209 NLRB 701, 703 (1974), "absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination had not yet been made." Also, the Board has held that it is no defense that such unilateral actions

<sup>22</sup> There are no allegations of any unlawfulness with respect to the 1979 layoffs, and the General Counsel stated none was being sought but that the evidence was offered as background only.

<sup>23</sup> Thompson testified that contract negotiations were called off by mutual agreement of the parties in 1977 pending a decision by the Fifth Circuit Court of Appeals in *Gulf States Manufacturers Inc. v. N.L.R.B.*, and that no further bargaining sessions were held between the parties from 1977 until 2 weeks prior to the November 1980 hearing of the instant case.

<sup>21</sup> A "tacker" is an individual, according to Thompson, who spot welds an item in place prior to a welder actually welding the piece permanently.

were made pursuant to an established company policy and without antiunion motivations. See *Amsterdam Printing and Litho Corp.*, 223 NLRB 370 (1976), enfd. 95 LRRM 3010, 81 LC ¶13,305 (D.C. Cir. 1977). Additionally, it is no defense that changes instituted by Respondent were economically expedient. *Master Slack and/or Master Trousers Corp.*, *supra*.

In light of the above principles, I conclude that Respondent could not unilaterally lay off bargaining unit employees without notification to, or bargaining with, the Union. The Respondent presented the Union a *fait accompli* with respect to the March 10 and April 8, 1980, layoffs. Respondent's defense that its actions were based on past practice is without merit in that the past practices of Respondent prior to the latest certification of the Union did not relieve Respondent of the obligation to consult with the certified Union regarding implementation of practices affecting terms and conditions of employment of unit employees. Respondent attempted at great length to establish the adverse economic conditions affecting both the metal building construction industry in general and Respondent in particular; however, economic expediency even in good faith does not excuse the duty to bargain with the Union with respect to the layoff of unit employees. Although the Board has not articulated what constitutes the "compelling economic considerations" exception to the "at its peril" principle established in *Mike O'Connor*, *supra*, I conclude that such a defense is not available in the instant case in that Respondent knew at least for a limited time prior to either of the layoffs whom it would lay off and why each individual was selected for layoff. Therefore, the Union with proper notification and an opportunity to bargain might have altered the result. Finally, Respondent contends that the procedure utilized to designate employees who would be subject to layoff was a provision of the existing seniority provision which Respondent and the Union had bargained over in 1977. This record does not conclusively establish that a seniority provision was negotiated with the Union at any time.

Accordingly, and in light of the above, I find that Respondent violated Section 8(a)(5) and, derivatively, Section 8(a)(1) of the Act when it failed to notify and bargain with the Union regarding the decision to lay off employees on March 10 and April 8, 1980.

Notwithstanding my conclusion that Respondent did not give notification to the Union or bargain with it with respect to the March 10 and April 8, 1980, layoffs, I conclude that Respondent did in fact bargain with the Union about the effects of the layoffs to the extent that the Union sought or requested to. That is, Union President Thompson requested and was provided listings of those laid off, and he made inquiry as to why certain selected employees were chosen while others with possibly less seniority were retained. Thompson acknowledged Respondent never at any time refused any request of the Union to discuss the layoffs. I conclude and find that Respondent did bargain about the effects of both the March 10 and April 8, 1980, layoffs. I shall therefore recommend dismissal of that portion of the complaint which alleges that Respondent failed to bargain about the effects of the layoffs.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III above, occurring in connection with its operations described in section I above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

Inasmuch as I have concluded that Respondent bargained with the Union regarding the effects of the two layoffs herein, I shall recommend that Respondent bargain, upon request, with the Union as the exclusive bargaining representative of the employees in the appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment, including any future layoffs at Respondent's plant. Under the circumstances of this case and in the absence of evidence showing the Union sought to negotiate over the continuation or termination of the layoffs, but rather it appears sought only to negotiate the manner and means of the layoff and recall, I shall therefore not recommend any backpay as any part of the remedy.

Upon the basis of the foregoing findings of fact and upon the entire record in this case, I make the following:

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All production and maintenance employees, plant clerical employees, full-time and regular part-time truck-drivers and leadmen employed at the Respondent's Starkville, Mississippi, location, excluding all office clerical employees, craftsmen, guards and supervisors as defined in the Act, constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.
4. The Union is the exclusive representative of the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
5. Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by laying off employees in the above-described unit on March 10 and April 8, 1980, without adequate timely notice to the Union and without affording the Union an opportunity to bargain collectively with respect to the decisions to lay off bargaining unit employees.
6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The General Counsel has not established by a preponderance of evidence that the Respondent has violated the Act as alleged in the complaint except to the extent found above.

Upon the foregoing findings of fact and conclusions of law and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>24</sup>

The Respondent, Gulf States Manufacturers, Inc., Starkville, Mississippi, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with the Union as the exclusive representative of the employees in the unit described above concerning rates of pay, wages, hours of employment, and other terms and conditions of employment.

(b) Laying off any bargaining unit employees or making or affecting any change in conditions of employment of the employees in the collective-bargaining unit without first giving adequate timely notice to the employees' collective-bargaining representative and afford-

ing such representative an opportunity to engage in collective bargaining with respect thereto.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain in good faith with the Union in the unit described above and, if an understanding is reached, embody such understanding in a written, signed contract.

(b) Post at its Starkville, Mississippi, plant copies of the attached notice marked "Appendix."<sup>25</sup> Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent, shall be posted by it immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not specifically found.

<sup>24</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>25</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."